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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY,
Petitioner,
vs.
REYNOLDS METALS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS, WROCK, MILLER & VIESON
FORREST A. HAINLINE, JR.
WILLIAM A. COUGHLIN, JR.
Attorneys for Respondent
4200 Penobscot Building
Detroit, Michigan 48226

OF COUNSEL:
FRED E. KINNEY, ESQ.
Assistant General Counsel
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23213

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Reynolds Metals Company herewith opposes Petitioner Dewey's Petition for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in this case on June 4, 1970 and on August 11, 1970, the latter being issued in response to a Petition for Rehearing.

OPINIONS BELOW

The opinion of the District Court denying Respondent's motion to dismiss (P.A. 9a-16a)* is reported at 291 F.Supp. 786. The opinion of the District Court ruling for Petitioner on the merits (P.A. 18a-28a) is reported at 300 F.Supp. 709. The opinion of the District Court denying a motion to stay execution (P.A. 29a-35a) is reported at 304 F.Supp. 1116. The opinions of the Court of Appeals, the majority holding for Respondent on the merits and remanding with instructions to dismiss the complaint (P.A. 41a-55a), are reported at 429 F.2d 324. The opinions of the Court of Appeals, the majority denying the petition for rehearing (P.A. 57a-63a), are reported at 429 F.2d 334.

STATUTE AND REGULATIONS INVOLVED

Sections 703(a)(1), 713(a) and (b) of the Civil Rights Act of 1964, (Title 42 USC Sections 2000e-2(a) (1), 2000e-12 a) and 2000e-12(b)):

Section 703(a)(1)
Title 42 USC Section 2000e-2(a)(1)):

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Section 713(a)
(Title 42 USC Section 2000e-12(a)):

> "(a) The Commission shall have authority from

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* This reference and succeeding references relate to page numbers in Petitioner's Appendices which are included with the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit dated September 30, 1970.

time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

Section 703(a)(1)
(Title 42 USC Section 2000e-12(b)):

"(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title."

Equal Employment Opportunity Commission Religious Discrimination Guidelines effective June 15, 1966 (31 F.R. 8370) and July 10, 1967 (32 F.R. 10298):

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES
(Effective June 15, 1966)

"Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

"(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated

to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:

"(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.

"(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

"(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

"(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such

an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES
(Effective July 10, 1967)

"Section 1605.1 Observance of Sabbath and other religious holidays. — (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hard-

ship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Respondent Employer's discharge of Petitioner from employment did not violate Title VII of the Civil Rights Act of 1964.

2. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Respondent Employer reasonably accommodated the religious needs of Petitioner Employee within the meaning of the applicable Guidelines issued by the Equal Employment Opportunity Commission.

3. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Petitioner Employee could not bring an action in a federal district court under the Civil Rights Act of 1964 after a grievance arising out of the same discharge has been adjudicated by arbitration under the provisions of the existing Labor Agreement.

STATEMENT

This is an action for money damages and reinstatement of position brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e, the Petitioner (Dewey) claiming that he was wrongfully discharged from employment by Respondent (Reynolds Metals Company) because of his religious beliefs.

Respondent is a corporation maintaining a "job type" plant in Wyoming, Michigan where it produces on an order

basis* aluminum extrusions and aluminum billets which find principal use in such industries as architecture, building, transportation, aircraft and missile. Paragraph 2, Stipulation of Facts (P.A. 1a). Prior to 1964 the plant was accustomed to operating on a five day weekly schedule. Due to an increase in business, during 1964 and 1965 the plant operated on a schedule that was described as "five plus" days which meant that the plant was operating on many Saturdays. This schedule was further increased in late 1965 and 1966 when the plant operated on a "six plus" days weekly schedule which meant that Saturdays were worked regularly and there were numerous Sunday work schedules. Paragraph 3, Stipulation of Facts (P.A. 2a).

The production and maintenance employees at Respondent's plant (which number included Petitioner) have been and continue to be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union) with whom the Respondent had a Labor Agreement. As an employee of Respondent, and a Union member, Petitioner was at all times subject to said Labor Agreement. Paragraphs 4 and 5, Stipulation of Facts (P.A. 2a).

Prior to the 1960 Labor Agreement between Respondent and the Union, overtime was performed on a voluntary basis on the part of each employee. Because of employee

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* This is not a mass production plant in the sense that products are manufactured to stock or before they have been ordered. Rather, a product is produced after an order therefor has been taken making it necessary for Respondent to meet delivery dates which have been set by its customers. Obviously, it is necessary for Respondent to satisfy its customers on delivery dates if it is to stay in business. Therefore, in a very real sense in times of high business activity, such as heavy military procurement, difficulty in scheduling overtime would result in a great hardship on Respondent.

unwillingness to work on certain overtime days such as Sunday the scheduling of overtime production was made impossible on such overtime days. Paragraph 6, Stipulation of Facts (P.A. 2a). The 1960 Labor Agreement and subsequent Labor Agreements including that negotiated with the Union in 1965 reflected a different posture on the part of Respondent in that Respondent negotiated a section which both granted the right to Respondent to set overtime schedules and created the obligation on the part of the employees to work both straight time and overtime work required of them unless they had a substantial and justifiable reason for not doing so. The 1965 Labor Agreement also included therein the manner in which the overtime assignments were to be implemented. Such were to be divided as equally as possible in each job classification in each department; if less than all employees in a classification were needed, the number required were to be scheduled pursuant to the overtime equalization chart and when there were not sufficient employees obtained on such voluntary basis, then the overtime was to be assigned by Respondent among the qualified employees in the classification in the inverse order of their seniority. Paragraphs 7 and 8, Stipulation of Facts (P.A. 2a-3a).

There was also voluntarily issued by the Respondent, at the time the 1965 Labor Agreement was finalized in September 1965, an interpretation of the Labor Agreement which provided that an employee would be relieved of his obligation to personally work overtime if such an employee furnished a qualified substitute. This replacement system was necessary to retain the contractual principle that the overtime obligation remained with the employee. Such system has been used extensively since its establishment. Paragraph 9, Stipulation of Facts (P.A. 3a).

In addition to the Labor Agreement Respondent has also had in effect since 1957 Plant Rules which are posted on bulletin boards in each department. The Rules, including Plant Rule 11 which covers "absence from work without reasonable cause," provide for progressive discipline running from a warning for the first offense, one week layoff for the second offense, and discharge for the third offense. Under the provision of these Plant Rules, the Respondent does have the option of imposing a lesser penalty if circumstances so warrant. Paragraph 10, Stipulation of Facts (P.A. 3a).

Petitioner was employed by Respondent at its plant on June 14, 1951 and has held various jobs including that of die repairman, which was the job he held at his discharge September 12, 1966. Paragraph 1, Stipulation of Facts (P.A. 1a). Petitioner has been a member of the Faith Reformed Church since December 4, 1961. From December 4, 1961 until his discharge Petitioner has never volunteered for Sunday overtime work, but he has volunteered for overtime work on days other than Sunday during such period. Paragraphs 11, 12 and 13, Stipulation of Facts (P.A. 3a-4a).

Petitioner was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the Labor Agreement. Petitioner refused because of his religious beliefs; he was given a verbal warning and at the same time was advised of the necessity of Respondent scheduling work on a seven (7) day basis and was told that a repetition of such conduct would result in disciplinary action under Plant Rule 11. Paragraph 14, Stipulation of Facts (P.A. 4a).

Thereafter, between January 1966 and up to but not including August 28, 1966, Petitioner was scheduled for overtime on at least five (5) Sundays pursuant to the

Labor Agreement. On each of said days Petitioner obtained replacements in accordance with the replacement system. Paragraph 15, Stipulation of Facts (P.A. 4a).

Petitioner was scheduled to work overtime on Sundays, August 28, 1966, September 4, 1966 and September 11, 1966 respectively but refused because of his religious beliefs. While Petitioner had expressed his religious beliefs against Sunday work to Respondent on prior occasions he had utilized the replacement system. On each of these three Sundays, however, he took the position that the obtaining of replacements was also against his religious beliefs. Petitioner also told one particular employee, who had served as his replacement on a number of occasions, that he would not request him to serve as his replacement again. Because of such refusal to work or to obtain replacements Petitioner was subjected to progressive discipline consisting of a written warning, a three (3) day layoff and finally discharge on September 12, 1966. Paragraphs 16, 17, 19 and 25, Stipulation of Facts (P.A. 4a, 5a and 6a).

On Sunday, August 28, September 4 and September 11 there were four (4), seven (7) and six (6) employees in the same classification as Petitioner who were qualified and not working who were available to Petitioner as possible replacements. There were also two (2) other employees, namely Zagman and Boyer, who were outside the classification but who were qualified, each of which was available on one of the Sundays in question. However, Zagman had been told by Petitioner that he would no longer ask Zagman to replace him. Paragraphs 16, 17 and 19, Stipulation of Facts (P.A. 4a-5a).

Prior to the discharge of Petitioner, Respondent had consistently applied the Labor Agreement and the Plant Rules

to employees who refused overtime work assignments on Sunday because of religious beliefs and to employees who refused such assignments on days other than Sunday for other reasons. This involved disciplinary action of varying degrees, running from warning to discharge depending on whether the violation was the first, second or third occasion. Paragraph 26, Stipulation of Facts (P.A. 6a-7a).

Pursuant to the Labor Agreement Petitioner filed grievances as to his three (3) day disciplinary layoff and protesting his discharge. The grievances were processed through the grievance procedure and in the final step thereof were submitted to an arbitrator who was mutually agreed to by the Respondent and the Union. In an Opinion and Award dated June 29, 1967, the arbitrator denied the grievances and sustained the disciplinary layoff and the discharge. Paragraph 27, Stipulation of Facts (P.A. 7a).

On September 16, 1966, which was a few days before Petitioner filed his grievance protesting his discharge, Petitioner filed an Application for the Issuance of a Complaint with the Michigan Civil Rights Commission alleging religious discrimination. On December 13, 1966, after investigation, that Commission issued a Notice of Disposition and Order of Dismissal stating the Commission had found insufficient grounds on which to issue a Complaint and application therefor was denied. Paragraphs 29 and 30, Stipulation of Facts (P.A. 7a). During the period subsequent to Petitioner's discharge and prior to January 1967 the United States Office of Federal Contract Compliance was invited to review the charges of discrimination alleged by Petitioner. That Office found no basis for a charge of discrimination.

On January 4, 1967, Petitioner filed a charge with the Equal Employment Opportunity Commission alleging dis-

crimination on a religious basis. On January 5, 1968 the Commission, contrary to the recommendation of the Regional Director of the Equal Employment Opportunity Commission for this area that no probable cause be found, determined there was reasonable cause to believe Respondent had engaged in unlawful employment practices under Title VII. Paragraphs 31 and 32, Stipulation of Facts (P.A. 7a and 8a). Conciliation efforts were made and thereafter Petitioner was notified by letter dated May 3, 1968 that he could institute a civil action in an appropriate Federal Court. Petitioner commenced the present action within thirty (30) days after the date of said letter, i.e., May 31, 1968.

Respondent moved for dismissal for failure to state a claim upon which relief could be granted for the reason that Respondent had made a binding election of forums. The District Court denied said Motion under date of October 18, 1968 (P.A. 9a-16a).

After a trial on the merits, the District Court rendered an opinion that the overtime procedures of Respondent violated the Civil Rights Act of 1964. The District Court based its decision on Guidelines issued by the Equal Employment Opportunity Commission in July 1967, which was ten (10) months after Petitioner had been discharged and also on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a case which involved state action (P.A. 18a-28a). Notwithstanding Respondent's motion for a stay of the judgment pending disposition of Respondent's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court, under date of July 25, 1969, ordered the reinstatement of the Petitioner with back pay and enjoined Respondent from requiring Petitioner to perform work for Respondent on Sundays. The District Court did stay that part of the Judg-

ment ordering the payment of back wages in the amount of seven thousand two hundred eighty-six dollars and ninety-two cents ($7,286.92), upon the filing of a fifteen thousand dollar ($15,000.00) Supersedeas Bond, pending a final disposition of this cause on appeal (P.A. 29a-40a).

Pursuant to the order of the District Court, Petitioner was offered reinstatement to his former position effective August 22, 1969; reported for employment on August 25, 1969, and has been so employed to date.

Under date of June 4, 1970, following the submission of briefs and oral argument, a majority of the Court of Appeals for the Sixth Circuit reversed the District Court holding that: Petitioner's discharge was not discrimination on account of religion; the District Court more appropriately should have applied the 1966 Equal Employment Opportunity Commission Guidelines, with which Respondent complied, rather than the 1967 Guidelines which were issued ten (10) months subsequent to the discharge; the discharge was not on account of Petitioner's religion but rather because Petitioner violated the provisions of the collective bargaining agreement, which provisions were applied equally to all employees; and in any event Respondent had made reasonable accommodation to Petitioner's religious needs through the vehicle of Respondent's replacement system. In addition to its decision on the merits the Court also held that suit in such a matter should not be brought in court after the same subject matter has been finally adjudicated by arbitration.

Thereafter, in response to a petition, a majority of the Judges of the Court of Appeals for the Sixth Circuit voted against a rehearing *en banc*. Under date of August 11, 1970, a majority of the panel who heard the case (Judge McCree having been designated to take the place of Judge

Combs who resigned prior to the filing of petition for rehearing) denied the petition for rehearing holding that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one (P.A. 57a-63a).

ARGUMENT

I.

IN REQUESTING CERTIORARI, PETITIONER ERRONEOUSLY URGES UPON THIS COURT THAT THE COURT OF APPEALS' OPINION IS OF SPECIAL IMPORTANCE AS REGARDS THE ADMINISTRATION OF THE CIVIL RIGHTS ACT OF 1964.

Petitioner cites the case of *Jackson* v. *Veri Fresh Poultry Co.*, 304 F.Supp. 1276 (1969), an unappealed decision of the United States District Court for the Eastern District of Louisiana which held that the discharge of a Seventh-Day Adventist because of her refusal to work between sundown on Friday and sundown on Saturday was a violation of Section 703(a)(1) of the Civil Rights Act of 1964. Petitioner states that the decision of the Sixth Circuit Court of Appeals in the case before this Court is in conflict with *Veri Fresh Poultry, supra,* and affects the orderly administration of the Civil Rights Act of 1964.

Respondent asserts that the decision in the case below, while important to the parties, is not of significance in the present administration of the Civil Rights Act. The reasoning set forth hereafter also leads to the conclusion that *Veri Fresh Poultry, supra,* is likewise no longer a factor in the administration of the Civil Rights Act.

The court below found that Petitioner was discharged because he violated the provisions of his collective bargaining agreement entered into by his union with Respondent Employer, which provisions were applied equally to

all employees. The violation consisted not only of refusing to work on Sundays when his turn arose in accordance with his position on the seniority list, but also his refusal to arrange for a replacement, which was an alternate procedure well known to and used by Petitioner on prior occasions.

The above disciplinary action and discharge occurred in August and September of 1966. The Religious Discrimination Guidelines of the Equal Employment Opportunity Commission in force at the time of Petitioner's discipline and discharge, which were effective June 15, 1966, contained provisions which permitted Respondent's actions. Those Regulations said in part at Section 1605.1(a)(3):

> "However, the Commission believes that an employer is free under Title VII to establish a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees."

The same Regulations at Section 1605.1(b)(3) also authorized the employer to prescribe:

> ". . . the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Section 713(a) of the Civil Rights Act authorized the Commission to issue Regulations and Section 713(b) thereof stated that reliance on such written interpretations shall

be a defense to any action based on any alleged unlawful employment practices.

In July 1967 the Equal Employment Opportunity Commission issued new Religious Guidelines and omitted both the above quoted language and other material parts of the 1966 Regulations. Instead of providing definite guidelines for affected employers, the Commission left the matter on an *ad hoc* basis for the decision of the Commission on the particular facts of each case (P.A. 48a).

The court below found that the Respondent complied with said 1966 Regulations in that Respondent established a normal work week generally applicable to all employees and that Respondent was under no obligation to accommodate Petitioner since Petitioner knew that the requirements of the collective bargaining agreement would conflict with his religious needs which were acquired subsequent to the time when Respondent negotiated the Labor Agreement which required employees to accept all work assignments. The court below held further that obligations contained in the collective bargaining agreement, which were lawful under Regulations of the Equal Employment Opportunity Commission then in effect, ought not to be impaired by the application of subsequently passed inconsistent regulations (P.A. 48a).

Thus, this cause of action occurring as it did in 1966, following the effective date of the 1966 Guidelines, required the application of such Guidelines. What a court might decide in a comparable factual situation arising subsequent to July 1967 is an entirely different question that requires application of the revised 1967 Guidelines which have remained in being to date of this writing. Consequently the decision in this case, which is predicated to a considerable extent on the 1966 Equal Employment Opportunity

Commission Guidelines, which Guidelines were revised in 1967 at a point in time after this factual situation arose, is of no particular significance as to causes of action arising after the issuance of the 1967 Regulations and accordingly is neither of great importance to the public at large nor to the orderly administration of the Statute. Consequently, certification should not be granted as requested by Petitioner.

II.

IN REQUESTING CERTIORARI, PETITIONER URGES UPON THIS COURT CONFLICTS, WHICH IN FACT, DO NOT EXIST.

Petitioner in attempting to establish grounds for certiorari under Supreme Court Rule 19, argues that the opinion below is in conflict with this Court's opinion, with decisions of other United States Courts of Appeals and with the interpretation of the Statute by the Equal Employment Opportunity Commission—the federal agency charged with the administration of the Civil Rights Act of 1964.

1(a) The first conflict is alleged to be with this Court's opinion in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which it was held that the denial of unemployment compensation benefits by the State of South Carolina to a Seventh-Day Adventist, who refused employment in a job requiring Saturday work, was unconstitutional in that it violated religious freedom as secured by the Free Exercise of Religion Clause of the First Amendment to the United States Constitution. Petitioner says the court below interprets the term "religion" as used in the Civil Rights Act as protecting only beliefs not practices while this Court holds "religion" as used in the First Amendment to extend beyond beliefs to practices or observances with some restrictions where public safety, peace or order is involved. Thus, asserts Petitioner, the decisions conflict. Without agreeing

with such a characterization of the opinion below, it is sufficient to say that in one case, *Sherbert, supra,* one is concerned with interpreting the Free Exercise Clause, which is intended to secure religious liberty in an individual by prohibiting any invasion thereof by civil authorities; while in this case one is involved with Title VII of the Civil Rights Act which, among other things, forbids religious discrimination in employment. The issue in *Sherbert, supra,* was free exercise of religion; the issue in this case is whether Respondent Reynolds Metals Company treated Petitioner Dewey in the same manner as everyone else in the administration of the Labor Agreement and not whether Petitioner can freely exercise his religion regardless of the Labor Agreement and regardless of how everyone else in the plant is treated. The nature of the rights subjected to judicial review are entirely different in these two cases. The term "religion" is used in two varying contexts, one being found in the Constitution and the other in the Civil Rights Act of 1964 and of necessity the word "religion" is subjected to a different interpretation in each of the contexts. There is no common ground; there is no conflict between the holding in *Sherbert, supra,* and the holding of the court below in this matter.

(b) The second example of conflict is said to be a conflict in principle between the decision of the court below and the decision of the Court of Appeals for the District of Columbia Circuit in *Barnett* v. *Rodgers,* 410 F.2d 995 (1969), wherein the issue was raised as to whether prison officials of the District of Columbia Jail were obliged to accommodate the religious dietary practices of prisoners who embraced the Muslim faith. Petitioner makes the assertion that the obligation of Respondent to select a substitute for Petitioner in certain work assignments is far more modest

than the requirements requested in *Barnett, supra,* i.e., one full-course pork-free diet once a day.

Barnett, supra, is predicated, as is *Sherbert* v. *Verner, supra,* on the First Amendment to the United States Constitution which, as interpreted in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) embraces two concepts: freedom to believe and freedom to act. This constitutional freedom to act gives rise to a possible obligation on the part of the District of Columbia Jail officials to accommodate the Muslim prisoners' religious dietary practices. Respondent submits that the Civil Rights Act of 1964 embraces concepts of nondiscrimination on a religious basis by an employer in terms of an individual's employment. It does not create a freedom to act as does the First Amendment in terms of practicing his religion at the expense of an employer. It does not permit an employee to refuse to work on a certain product, the nature of which might be objectionable for religious reasons; it does not permit an employee to leave his work for periods of time each day for religious purposes. The Civil Rights Act does mandate equal employment opportunity for all employees regardless of religion. The holding of the court in *Barnett, supra,* regarding the degree of official deference to religious obligations which may be owed to Muslim prisoners is based on First Amendment language, the requirements of which are entirely different from those found in the Civil Rights Act of 1964. Again, Respondent submits there is no conflict between *Barnett, supra,* and the holding of the court below.

(c) The third area of conflict is based on the decision of the court below in relationship to this Court's ruling in *Udall* v. *Tallman,* 380 U.S. 1 (1965) wherein it was said:

> "When faced with a problem of statutory construction, this Court shows great deference to the

interpretation given the statute by the officers or agency charged with its administration." (380 U.S. 16)

The court below found that the district judge applied the July 10, 1967 Regulations, which were adopted by the Equal Employment Opportunity Commission nearly ten months after Petitioner Dewey had been discharged, and ignored the June 15, 1966 Regulations, which permitted the establishment of a normal work week generally applicable to all employees, notwithstanding the fact that the schedule might not operate with uniformity in its effect on the religious observances of all employees; and also restricted any obligation to accommodate for religious needs if the employee knew the job requirements would conflict with his religious obligations. The Equal Employment Opportunity Commission, in an Amicus Brief presented to the court below, attempted to justify the retroactive application of the 1967 Regulations by asserting that its Regulations are only "interpretations" and that "the timing of the Commission interpretation is irrelevant" since the 1966 Regulation is now a "defunct Commission guideline" (P.A. 59a-60a).

The court below ruled that Respondent complied with the 1966 Regulations issued by the Equal Employment Opportunity Commission and found further that obligations contained in the collective bargaining agreement, which were lawful under the Regulations of the Equal Employment Opportunity Commission then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation (P.A. 48a).

This Court has also ruled in *Udall*, 380 U.S. at 16, that the question of deference to the administrative agency is

even more in order when the construction of an administrative regulation is in issue:

> "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous . . ." (380 U.S. 16, 17)

Plainly the application of the 1967 Regulations by the Equal Employment Opportunity Commission were erroneous; the court below has so held and rather than conflict as to *Udall, supra,* there is agreement.

Respondent also submits that on the strength of the above argument as to the application of *Udall, supra,* to this case, there is no conflict with the decision of the Court of Appeals for the Fifth Circuit in *Weeks* v. *Southern Bell Telephone and Telegraph Company,* 408 F.2d 228 (1969).

2(a) As a final argument relating to conflict, Petitioner refers to a conflict among the Fifth, Sixth and Seventh Circuit Courts of Appeals as to the concurrent jurisdiction problem that arises in Title VII cases, i.e., jurisdiction under the statutory scheme and under the grievance and arbitration system of a labor contract. The issue was raised in the decision of the court below; also in *Bowe* v. *Colgate Palmolive Company,* 416 F.2d 711 (7th Cir. 1969) and in *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303 (5th Cir. 1970).

While there is a difference in the holdings in the above cases as to the treatment to be accorded concurrent jurisdiction, Respondent submits that the issue is not material to this case. Petitioner had a full hearing in the District Court and thereafter on appeal the case was reviewed by the court below and a decision was given on the substantive issue as to whether there was a violation of the Civil Rights Act by Respondent (P.A. 41a-51a; 57a-60a). The further holding of the court below as to the procedural effect of

arbitration on the concurrent jurisdiction question did not in any way affect or detract from Petitioner's having a complete hearing on the merits. In a sense the holding of the court below as to the concurrent jurisdiction question is *dicta* because it in no way affected Petitioner's rights.

A different question would be before this Court if this case took on the posture of *Hutchings, supra,* wherein employee Hutchings was not given a hearing on the merits at the district court level and the question was sent to the Court of Appeals on the procedural question alone. Consequently, Respondent submits that this is not an appropriate case in which to review the concurrent jurisdiction controversy.

As an added reason for opposing the Petition for Writ of Certiorari on the basis of the concurrent jurisdiction question, Respondent respectfully submits to this Court that Senate Bill (S.2453) entitled Equal Employment Opportunities Enforcement Act of 1970, was approved by the United States Senate on October 2, 1970 by a vote of 42 to 24. This Bill, which is out of Committee in the House of Representatives and is awaiting action, grants to the Equal Employment Opportunity Commission power to enforce its decisions similar to other federal regulatory agencies, such as the National Labor Relations Board. Review of the Commission orders under this Bill may be had in a United States Court of Appeals as is the case under the provisions of the National Labor Relations Act, as amended. Assuming the above-mentioned Senate Bill passes the other House of Congress, and this is the type of enforcement provided by 34 of the 38 states with Equal Employment Opportunity laws, the question of concurrent jurisdiction as between the Federal district court system and the grievance-arbitration system of a labor contract

will be moot and the principle to be obtained from a decision of this Court would have no application to future cases.

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should not grant the Writ of Certiorari requested by the Petitioner.

DATED:

Respectfully submitted,
CROSS, WROCK, MILLER & VIESON

By _____
FORREST A. HAINLINE, JR.
WILLIAM A. COUGHLIN, JR.
Attorneys for Respondent
4200 Penobscot Building
Detroit, Michigan 48226

OF COUNSEL:
Fred R. Edney, Esq.
Assistant General Counsel
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23218